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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

JOHN H. GATELY,
Counsel for Respondents.

GERALD J. KOPTIK,
Of Counsel.

THE CONTRACT-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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RESPONDENTS' STATEMENT MAKING AGAINST THE JURISDICTION.

Respondents respectfully call the court's attention to the following grounds making against the jurisdiction of the court in this matter:

First, it is manifest that the petitioner has filed the petition only for purposes of delay.

The questions upon which it is claimed that the jurisdiction of this court depends are so unsubstantial and unrelated with the issues decided by the United States Circuit Court of Appeals as to need no further arguments.

Secondly, petitioner's assignment of errors fails to set out and show a compliance with Rule 38 Paragraph 2 of

the Rules of the Supreme Court. The petitioner fails to particularly disclose the basis upon which it contends that this court has jurisdiction. It cites no cases sustaining jurisdiction on the point involved. The petitioner fails to cite any cases decided by any other United States Circuit Court of Appeals or any other Circuit in conflict with the decision herein sought to be reviewed. *U. S.* v. *Rimer*, 220 U. S. 547.

All of the cases involving the question of procedure before the United States Supreme Court hold that petitioners for certiorari must with particularity show a compliance with the rules of the court in setting forth the grounds on which they claim the court has jurisdiction.

We respectfully suggest that the decision of the United States Circuit Court of Appeals of the Seventh Circuit was founded on a matter of judicial procedure. (R. 112.)

> "This case presents a question of fact as to whether a compromise of the claims relied upon in the plaintiff's complaint had been compromised by the plaintiff's agents. The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained. Because we think this record affirmatively shows there was an issue of fact, the motion for summary judgment should not have been granted."
>
> Rule 56 of the Rules of Civil Procedure, 28 U. S. C. A.

We respectfully submit that Rule 56 should dispose of the present petition.

The record in the instant case clearly shows several issues of fact material to the controversy (R. 42) and in the

case of *Merchants Indemnity Corp. of N. Y.* v. *Peterson*, 113 Fed. (2nd) 4, 6, the record there stated that under Rule 56 a summary judgment may not be entered if there be an issue presented as to the existence of any material fact.

We submit that under Rule 56 and the decided cases, it is not contemplated that a trial should be had by affidavit when there are undecided issues of fact, without a right of cross-examination in open court.

Campana Corp. v. *Harrison*, 135 Fed. (2nd) 334, 336.

Merchants Indemnity Corp. of N. Y. v. *Peterson*, 113 Fed. (2nd) 4, 6.

BRIEF IN SUPPORT OF REPLY.

A.

Summary and Short Statement of the Matter Involved.

Respondents respectfully call this court's attention to the fact that at the top of page two of the petitioner's brief, it alleges that it is aggrieved by the decision of the United States Circuit Court of Appeals in denying a petition for rehearing, and that Judge Kerner dissented from this ruling. The truth of the matter is that Judge Kerner did not dissent. Judge Kerner did not concur. (R. 129.)

Petitioner fails in its summary to set forth all of the case upon which the opinion was rendered; namely; that a motion to strike the motion to dismiss and for summary judgment, was filed by the respondents (R. 41), and that a reply and counter-affidavit (R. 43-61) were filed by the respondents controverting the facts alleged in petitioner's affidavit in support of its motion.

B.

Statement of the Basis Upon Which It Is Contended That This Court Does Not Have Jurisdiction to Review the Judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

The petitioner herein states that the jurisdiction of this court to grant the Writ of Certiorari is invoked under Section 240 (a) of Judicial Code (28 U. S. C. A. 347). The petitioner, however, fails to show specifically where, and under what part, of the aforesaid Section it seeks to invoke this Court's jurisdiction.

It is a well established principle of law that the jurisdiction of this tribunal to review decisions of the various Circuit Courts of Appeal should be sparingly exercised, and then only in cases of peculiar gravity and general importance; in cases affecting relations with foreign governments; or to secure uniformity of decisions among the various Circuit Courts of Appeal.

Lau Ow Bev, Petitioner, 141 U. S. 583, 587.
Fields v. *U. S.,* 205 U. S. 292, 296.
Hamilton-Brown Shoe Co. v. *Wolf,* 240 U. S. 251.
Houston Oil Co. v. *Goodrich,* 245 U. S. 440.

The petitioner herein fails with any particularity to show that the decision herein sought to be certified comes under any of the aforesaid reasons. It alleges that the decision is in conflict with the decisions of this Court and other Circuit Courts of Appeal, but fails to point out wherein it does so. We shall point out in later phases of our brief that the cases cited by the petitioner, supposedly in conflict with the decision rendered by the Circuit Court of Appeals in the instant case, are not even remotely similar.

On page five of its brief, the petitioner states:

> "If the decision of the Circuit Court of Appeals in this case is not reversed, collective bargaining will be destroyed."

The decision sought to be revitewed herein does not involve the issue of collective bargaining. It does not involve disputes concerning rates of pay, rules or working conditions, but does involve a question of Federal Court procedure wherein the authority of an agent to represent principals concerning their personal rights is challenged, and we maintain that officials of a trade union are not the agents of members for the purpose of waiving any personal rights they may have, unless they have specific authority so to do.

Illinois Central v. *Moore,* 112 Fed. (2nd) 959 (Reversed by this court on other grounds) 61 S. Ct. 754.

Pearcy v. *Louisville N. Y. Ry. Co.,* 248 S. W. 1042, 1045.

Panhandle Ry. v. *Wilson,* 55 S. W. (2nd) 216, 219.

McCoy v. *St. Joseph Belt Ry.,* 77 S. W. (2nd) 175, 178.

Ahlquist v. *Alaska etc.,* 39 Fed. (2nd) 348.

Under the Railway Labor Act, 45 U. S. C. A. Paragraph 153, the employee has the right to bring his action in court, or he may utilize the administrative remedies therein set forth. In *Adams et al.,* v. *N. Y. Central & St. Louis Ry. Co.,* 121 Fed. (2nd) 808. On page 810, the court said:

> "In view of the Supreme Court's clarifying language as to the intended scope of the Railway Labor Act, * * * we can definitely state that the employees' action may be brought at their election, either in a court or settled by the administrative remedies prescribed by said Act."

Petitioner throughout its petition and all of the authorities that it has cited in support of its contention that collective bargaining is the gist of the action here involved, has cited cases on an entirely different and distinct section of the Railway Labor Act, being Section 155 thereof, dealing with the Mediation Board, set up under the Railway Labor Act, which was designed by Congress to mediate controversies arising between unions and between unions and the employer carrier, which provides for no interference nor interpretation by the courts. It is merely set up for the purpose of acting in a referee capacity.

The decision herein sought to be reviewed deals solely with a question of procedure for summary judgment, as issues of fact had been presented by the affidavits in support of defendant's motion, and controverted by plaintiff's reply and counter-affidavit wherein they denied the authority of the agent to handle their individual and personal claims before the Railway Adjustment Board.

On page four, petitioner states that the Railway Labor Act and the decisions of this court prohibit individual dealings with employees. This assertion does not correctly represent the law and is contradicted by the statute and the very cases cited by counsel, which he still insists upon alleging, although corrected in the Circuit Court of Appeals. Section 152 of the Railway Labor Act, the fourth paragraph, *inter alia*, reads as follows:

> "That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees, from conferring with management during working hours without loss of time * * *."

On page five, petitioner cites the case of *J. I. Case* v. *National Labor Relations Board*, 64 Sup. Ct. 576, in support of its contention that the Railway Labor Act prohibits individual dealings between employees and employer. We

could dismiss the case by remarking that it involves the National Labor Relations Act and not the Railway Labor Act, but we call the court's attention to a statement found in the case in order to point out the attempt by petitioner to mislead the court. On page 581 this court therein stated:

> "We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or is not part of an unfair labor practice."

which we submit is diametrically opposed to petitioner's contention.

Petitioner also cites, *Order of Railroad Telegraphers* v. *Railway Express Agency*, 64 Sup. Ct. 582, supposedly supporting the same contention. In this case the Express Company attempted to vary the terms of an agreement negotiated through collective bargaining, by entering into individual contracts with its employees. The Court ruled that the agreement negotiated through collective bargaining was not superseded by individual contracts and that the latter were ineffective. The facts in the case are not even remotely analogous to the instant case.

On page six of its brief, the petitioner cites five cases as supposedly being in conflict with the decision rendered by the Circuit Court of Appeals in the instant cause. We shall not burden this Court by reviewing and analyzing all of the five cases, but in order to show petitioner's misconception and misconstruction of the law applicable to the instant cause, we shall briefly analyze two of the five cases cited by petitioner.

In *Division 525, Order of Railway Conductors* v. *Gorman, et al.*, 133 Fed. (2nd) 272 (C. C. A. 8th, 1943), the president of the Order had the power to "confirm, reverse or annul, and remand for reconsideration" any contract entered into by the union on behalf of the employees. The president of the Order cancelled a contract and the employees ques-

tioned the validity of the cancellation of the first contract. The Court in sustaining the cancellation of the contract emphasized the fact that the decision of the president of the Order was final. On page 278 the Court said:

> "While we think it is not within the province of the court to determine the regularity of the procedure to enter into the agreements involved, yet a study of the record convinces that the procedure was that prescribed by the rules of the Order and, hence, the decision of the president was valid and binding on the plaintiffs."

In *Virginian Railway Company* v. *System Federation, No. 140,* 300 U. S. 515. On pages 548-549, the court made the following statement:

> "We think, as the government concedes in its brief, that the injunction against petitioners entering into contract concerning rules, rates of pay and working conditions, except with respondents, is designed only to prevent collective bargaining with anyone purporting to represent employees other than respondent, who has been ascertained to be their true representative. When read in its context, it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, *but not as precluding such individual contracts as petitioner may elect to make directly with individual employees.*" (Italics ours.)

In the second paragraph on page six of its brief, petitioner makes the allegation that the present case is not unlike a jurisdictional controversy between unions. It cites three cases to the effect that jurisdictional controversies between unions are not justiciable controversies within the meaning of the Railway Labor Act. All of the cases cited by the petitioner to support this point involved hearings before the National Mediation Board and are not in point.

On page four petitioner makes the allegation that this

case necessarily involves a construction of the Railway Labor Act. We have heretofore attempted to point out to this court what the case involves and respectfully suggest that by this statement petitioner is "Putting the cart before the horse." If it should be found that the purported agent of the plaintiff respondents herein, did not have authority to submit the individual and personal claims of the employees to the Adjustment Board, then any questions concerning the Railway Labor Act, or a decision of the Adjustment Board could not arise, because the proceeding before the Adjustment Board would be void, because the Board lacked jurisdiction. If under the controverted question of authority of the agent, it is decided, after a due and proper trial in court, that the agent did represent these respondents, then the question of the finality of the decision of the Adjustment Board could be raised, as also the question of the constitutionality of the Railway Labor Act, the Act failing to give the employee a right of review of the Board's decision when the Act in effect gives a right of review to the employer, thereby violating the due process provision of the United States Constitution.

But, we respectfully submit, those questions are not, and cannot be before this Court, until the question of agency is determined; and that, by a properly constituted and impaneled jury.

In summarizing, we respectfully reiterate that the only principle of law decided by the United States Circuit Court of Appeals in the instant case, is a matter of procedure, as to whether or not a District Court should properly, upon a hearing by affidavits, enter an order on a motion for summary judgment, when there is a dispute as to a material fact.

There is no disagreement with this decision and any

other decision of the various circuits of the Circuit Courts of Appeal. Petitioner has cited none in point.

C.

The Questions Presented.

The questions that petitioner set forth in paragraph C of its petition entirely ignore the actual issue presented by the decision of the United States Circuit Court of Appeals in the instant case, for none of them was passed upon, nor decided by, the court in its decision herein sought to be reviewed. Petitioner has avoided the real issue in controversy.

D.

Reasons Relied Upon for Not Allowing the Writ.

As heretofore shown, the decision of the Circuit Court of Appeals does not conflict with any decisions of this court nor with decisions of other Circuit Courts of Appeal.

We feel certain that this court will not wish to be burdened with a question of procedure that has been stated by rules and followed uniformly by the different Circuit Courts of Appeal.

> Rule 56 of the Rules of Civil Procedure, 28 U. S. C. A.
>
> *Campana Corp.* v. *Harrison,* 135 Fed. (2nd) 334, 336.
>
> *Merchants Indemnity Corp. of N. Y.* v. *Peterson,* 113 Fed. (2nd) 4, 6.

This court is too familiar with the long established doctrine that where a court or administrative tribunal does not have jurisdiction over the parties any order entered by it is void. We will, therefore, not burden the Court with

any further discussion or citation on the matter, but wish to assert the same in answer to petitioner's statement contained under Heading "D".

Conclusion.

In our brief, we have pointed out that the only question involved in the instant cause is one of procedure; namely, whether or not the district court was in error in entering a summary judgment.

We have shown that the instant cause does not involve the question of collective bargaining, nor the construction of the Railway Labor Act. The cases cited by petitioner in its brief involve controversies before the National Mediation Board and, consequently, are not in point.

The petitioner has failed to show that the case is one of peculiar gravity or that there is any conflict between the decision in the instant case and the decisions of the other Circuit Courts of Appeal. The foregoing reasons impel the conclusion that in this case, certiorari should be denied.

Respectfully submitted,

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GERALD J. KOPTIK,
Of Counsel.